Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 166

JOHNSON & HIGGINS OF CALIFORNIA,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 21, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,863)

(36,863)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 23, 1932

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 166

JOHNSON & HIGGINS OF CALIFORNIA, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Johnson & Higgins of California, prays that a writ of certiorari issue to review a judgment of the Court of Claims (fol. 18) entered on the 4th day of April, 1932 ordering that the petition be dismissed.

Special Findings of Fact and Conclusions of Law were made by the Court of Claims (fol. 10 to fol. 12) and an opinion not yet reported was rendered (fol. 12 to fol. 17). [fol. 2] Jurisdiction of this Court is provided by Section 288 of Title 28 of the United States Code.

Statement of Facts

In December, 1918 the United States Army Transport "Logan" was engaged in a voyage from San Francisco to Manila with a general cargo aboard which consisted in part of supplies for the American Expeditionary Forces in Siberia, supplies for the American troops in the Philippine Islands, supplies belonging to the Government of the Philippine Islands, supplies belonging to the American Red Cross and property of the Manila Railroad Co., together with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of this cargo was being transported on said vessel free of charge (fol. 11 and 12).

The "Logan" was under the operation, management and control of the United States (fol. 10).

During the course of the voyage a serious fire which imperilled the ship and her cargo broke out on the "Logan" which was extinguished by the officers and crew of the vessel, and the vessel and some of the cargo was thus saved from destruction by the general average sacrifice. Extinguisiing a fire with water that damages cargo is one of the commonest of general average cases. A portion of the [fol. 3] cargo was damaged by the water with which the fire was extinguished (fol. 10). Some or all of the cargo aboard the United States Army Transport "Logan" at the time of the fire was covered by private insurance against general average losses.

On August 22, 1922 Hugh Williams, Captain, Q. M. C., and Administrative Officer, Army Transport Service, wrote petitioner, professional average adjusters, with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined" (fol. 10).

On August 28, 1922 petitioner answered this communication, stating that "the preparation of the adjustment will receive our early attention."

Attached to respondent's letter to the petitioner of August 22, 1922 was a letter from the Acting Judge Advocate General of the United States to the Quartermaster General of the United States dated July 21, 1922 and having reference to the claim of the marine underwriters for contribution in general average, which letter stated, *inter alia*, as follows:

"3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in gen- [fol. 4] eral average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this officer to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general

average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.

* * * * * * *

"For the Acting Judge Advocate General.

"(S.) Sherman Moreland, Sherman Moreland, Colonel, Judge Advocate, Chief Administrative Law Division" (fol. 10 & 11).

Pursuant to the instructions received in the letter of August 22, 1922 petitioner made the customary investigation of the facts concerning the fire on the United States Army Transport "Logan", and prepared the usual general average statement dated December 31, 1926. On or about [fol. 5] January 5, 1927 the petitioner forwarded copies of this statement to the general superintendent, United States Army Transport Service, San Francisco, California.

At the time the general average statement was sent by the petitioner to the general superintendent, United States Army Transport Service, at San Francisco, California, petitioner also sent to the respondent a bill which included the following items:

Plaintiff's charge for its services in the matter	$2,250.00
Pillsbury & Curtis, for valuing vessel	50.00
Telegrams	3.12
Dakin Publishing Co., for printing general average statement	62.00

The charge of $2,250.00 is the usual, customary and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the petitioner (fol. 11).

Thereafter, in May, 1928, the Comptroller General advised the petitioner that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, but that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim (fol. 11). This was the amount of petitioner's out of pocket disbursements.

The petitioner has received no payment of any kind for its services or disbursements in connection with the preparation of the general average statement.

[fol. 6] The Court of Claims held that under the facts outlined above the United States was not obligated to contribute in general average and, therefore, that no one could have any authority to contract in its behalf for a statement of general average (fol. 15).

Holding of the Court Below

The Court of Claims held:

A. That there was no general average involved in putting out the fire because there was no express contract between the shipowner and cargo owner which provided for general average (fol. 13, last par.).

B. That there could be no general average involved because the cargo was being carried by the "Logan" free of charge (fol. 13, last par.). The Court thought that the payment of freight was a prerequisite to the creation of a general average situation.

C. That the Government had no interest in the statement of general average. This holding was based on the erroneous ground that the Government was not liable to contribute for the sacrifice of the cargo which saved the whole adventure and consequently that no one could have any authority from the Government to contract for a statement of general average in which the Government had no interest (fol. 15, par. 3).

[fol. 7] D. That the Government was not obligated to pay for the adjustment of general average which it received from the plaintiff and retained, even though as owner of the "Logan" it was under a legal obligation to have such a statement prepared (fol. 16, last par.).

Questions Presented

1. Whether the obligation to contribute in general average and the right to receive general average contribution arises from a special contract or out of the general maritime law that all interests benefited by a voluntary sacrifice in time of mutual peril, whether ship or cargo, must contribute equitably to the cost of saving ship and cargo. See Mr. Justice Stone's opinion in Charter Shipping Co. v. Bowring, 281 U. S. 515.

2. Whether the fact that cargo is being carried without payment of freight operates to extinguish the long established rule of maritime law that a ship must contribute in general average in the event of a voluntary sacrifice of cargo, and the cargo to the ship, if the ship has made sacrifices for mutual benefit.

3. Whether the administrative officer of the Army Transport Service was without authority to contract for a statement of general average because the Court below held [fol. 8] (erroneously) that the Government was not interested in general average.

4. Whether the Government as a shipowner which was under a legal obligation to have prepared an adjustment of general average, was obligated to pay to the petitioner the fair value of such an adjustment which it received from the petitioner and retained. Ralli v. Troop, 157 U. S. 386.

Reasons for Granting Writ of Certiorari

1. The decision of the Court of Claims that the obligation to contribute in general average and the right to receive general average contributions arises out of a special contract between the shipowner and the cargo owner and does not arise out of general maritime law is in conflict with the decisions of the Supreme Court of The United States and with all English authorities.

Charter Shipping Company v. Bowring, 281 U. S. 515.

Ralli v. Troop, 157 U. S. 386.

Hobson v. Lord, 92 U. S. 397.

Barnard v. Adams, 10 How. 270, 303.

The Eagle, 8 Wall. 15, 23.

Carver on Carriage of Goods by Sea, 7th Ed. page 513.

[fol. 9] Duckworth on Marine Law, 3rd Ed. page 186.

Lowndes' General Average, 6th Ed. page 32, 53.

Arnould on Marine Insurance, (11th Ed.) Vol. II, sec. 908, note (g).

Milburn v. Jamaica Fruit, etc., Company (1900), 2 Q. B. 540, 550.

2. A fundamental point of maritime law in relation to general average is presented which is of great importance

to commercial and shipping interests and to the Government as well. This particular case on the decision below operates in favor of the Government. The situation, however, might equally well be reversed and a Government vessel might be seeking contribution from cargo because of sacrifices made by the ship. In such a case a Government ship which made heavy sacrifices for cargo's benefit could recover nothing.

3. The Government, as owner of the "Logan", was under a legal obligation to have prepared an adjustment of general average (Ralli v. Troop, 157 U. S. 386). Therefore, the decision of the Court of Claims in holding that the Government was under no obligation to pay to the petitioner the fair value of the general average statement which it ordered and received from the petitioner [fol. 10] and retained is in conflict with the decisions of this Court. Clark v. United States, 95 U. S. 539, 543; Crocker v. United States, 240 U. S. 74, 81.

4. The decision of the Court of Claims introduces an unfortunate conflict of authority on an important point in the law of general average, which has hitherto been uniform in this country and in England.

Respectfully submitted.

Johnson & Higgins of California, by Cletus Keating, Counsel for Petitioner.

New York, June 17, 1932.

[fols. a & 1] In Court of Claims of the United States

No. K-89

Johnson & Higgins of California, Claimant,

against

The United States

I. Petition—Filed March 22, 1929

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The petition of Johnson & Higgins of California respectfully alleges on information and belief as follows:

First. The claimant, Johnson & Higgins of California, is a corporation duly organized and existing under the laws of the State of California, with an office and place of business at No. 311 California Street, San Francisco, California, and is duly authorized to conduct the business of Average Adjusters and Insurance Brokers.

Second. On information and belief, at all the times hereinafter mentioned, the defendant, the United States, was the owner of and operating and in control of the United States Army Transport Logan.

Third. On or about the 5th day of December, 1918, the said Transport Logan sailed from the Port of San Fran- [fol. 2] cisco, California, bound for Manila, Philippine Island, with cargo aboard belonging to various owners.

Fourth. On or about December 16, 1918, and again on or about December 22, 1918, fire broke out in the hold of the Transport Logan while the said vessel was at sea in the Pacific Ocean, creating a situation of imminent peril to ship and cargo. In the interests of all concerned, the Master caused water to be poured into the hold for the purpose of extinguishing the said fire and to prevent a total loss of vessel and cargo. The fire was thereby extinguished, but the cargo was badly damaged by reason of contact with the water. Thereafter, upon arrival of the Transport Logan at Manila, Philippine Islands, her cargo was discharged at that port.

Fifth. By reason of the premises, the United States, as owner of the Logan, became obligated to have made an adjustment of the general average arising out of the voluntary act of the Master set forth hereinabove.

Sixth. On or about July 21, 1922, the Acting Judge Advocate General of the United States recommended that the matter be referred to an Average Adjuster, and thereafter on or about August 22, 1922, Johnson & Higgins received written instructions from the General Superintendent, United States Army Transport Service, to prepare a statement of general average arising out of the above matter. A copy of these instructions is attached hereto and made a part hereof, marked Schedule "A".

Seventh. Accordingly, pursuant to the aforesaid instructions, the claimant secured the necessary information, duly

[fol. 3] prepared a correct and proper general average statement dated December 31, 1926, and on or about January 5, 1927, forwarded copies of the same to the General Superintendent, United States Army Transport Service, at San Francisco, Cal.

Eighth. The fair and just value of claimant's services in the premises amounted to $2,250. Necessary disbursements amounted to $115.12, a total of $2,365.12. Payment of this amount has been duly demanded by the claimant of the defendant.

Ninth. Thereafter and on or about May 22, 1928, the claimant received notification from the General Accounting Office that the entire claim had been disallowed. A copy of this notification is attached hereto and made a part hereof, marked Exhibit "B".

Tenth. Thereafter claimant made application to the General Accounting Office for a review of the disallowance of said claim, and for the allowance of the claim as a valid debt and obligation of the defendant herein. On or about November 27, 1928, the Comptroller General of the United States notified the claimant that the claim for the claimant's services as aforesaid, in the amount of $2,250, was rejected, and that a recommendation would be made to Congress that an appropriation of $115.12 be made in payment of claimant's disbursements. A copy of this notification is attached hereto and made a part hereof marked Schedule "C".

Eleventh. No part of the aforesaid sum of $2,365.12 has been paid, and this amount is wholly due and owing from [fol. 4] the defendant to the claimant, and the claimant is justly entitled to the said amount after allowing all just credits and offsets.

Twelfth. The claimant is a citizen of the United States, and has at all times borne true and faithful allegiance to the Government of the United States, and neither it nor any of its officers have in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The claimant owns the claim sued upon, and no transfer or assignment thereof or any part thereof or interest therein has been made. No action upon the said

claim has been taken in Congress or by any department of the Government or in any court except as hereinabove set forth. Claimant believes the facts herein stated to be true.

Wherefore claimant prays for process and judgment against the United States, in favor of the claimant, for the sum of $2,365.12, with interest thereon from the 31st day of December, 1926, as just compensation in respect of the matters hereinabove alleged, together with the costs of this suit, and the claimant prays that right and justice may be done in the premises according to the laws of the United States and the rules and practice of this Honorable Court.

Johnson & Higgins of California, by John A. Bishop, First Vice-President. Cletus Keating, Attorney for Claimant, 27 William St., New York, N. Y.

[fol. 5] *Duly sworn to by John A. Bishop. Jurat omitted in printing.*

[fol. 6] SCHEDULE "A" TO PETITION

Copy

War Department

Zone General Supply Dept., Fort Mason, San Francisco, Cal.

Office of General Superintendent

Army Transport Service

WFK:LD.

Fort Mason, Calif., Aug. 22, 1922.

Subject: Preparation of General Average Statement.

To Johnson & Higgins, Average Adjusters, 433 California St., San Francisco, Calif.:

1. Enclosed is file of papers having reference to loss of cargo shipped from San Francisco to Vladivostok and Manila on the United States Army Transport "Logan",

voyage leaving San Francisco December 5th, 1918, the loss being caused by fire which occurred in the hold of the ship on December 16th and 17th, 1918.

2. It is requested that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined.

For the General Superintendent.
(Signed) Hugh Williams. Hugh Williams, Captain, Q. M. C., Administrative Officer, A. T. S.

2 encls.
Proceedings Survey Board.
File of correspondence.

[fol. 7] SCHEDULE "B" TO PETITION

Notice of Disallowance of Claim

Civil

General Accounting Office, Claims Division

Claim No. 03399(19).
Washington, D. C., May 22, 1928.

Johnson & Higgins, 311 California Street, San Francisco, California:

Your claim(s) for $2,365.12 for costs and services rendered in preparing claims for allowance in General Average, obtaining contributory values, etc., in connection with fires which occurred on the U. S. A. T. "Logan" in December, 1919, has (have) been examined and disallowed, per the above certificate number, for the following reasons:

At the time of the fire all cargo and supplies aboard the U. S. A. T. "Logan", were the property of the United States and there could have been no liability on the Government for general average contribution. Therefore there being no necessity for preparing claims for allowance in

General Average the officer (General Superintendent, A. T. S.) was without authority to contract for such service.

J. R. McCarl, Comptroller General, by (Signed) Orlando F. Syker.

[fol. 8] SCHEDULE "C" TO PETITION

Comptroller General of the United States, Washington

A-23372.

Nov. 17, 1928.

Johnson & Higgins, 311 California Street, San Francisco, Calif.

SIRS: There has been received your letter of September 5, 1928, inquiring as to the status of your claim for $2,365.12 in connection with an attempted general average adjustment in the case of the U. S. A. T. Logan, and in reply thereto you are advised that, pursuant to Public No. 247, April 10, 1928, I have concluded to recommend to the Congress at its next session that an appropriation of $115.12 be made in payment of your claim.

The items aggregating $115.12 appear to represent your out-of-pocket expenditure in connection with this purported general average adjustment. There was no authority for making the adjustment and it conferred no benefits whatever on the United States. I am unable to recommend payment of your claim for $2,250 for your services in connection therewith.

If the Congress should approve the recommendation for the payment of any sum to you, you will then be notified by this office with respect thereto without further action or inquiry on your part.

Respectfully, (Signed) J. R. McCarl, Comptroller General of the United States.

[fol. 9] II. GENERAL TRAVERSE—Filed May 1, 1929.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant

herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. History of Proceedings

On January 12, 1931, this case was submitted on merits, without argument, on stipulation of parties, by Mr. Cletus Keating, for plaintiff, and Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

On May 4, 1931, the court filed an order remanding the case to the General Docket and referring case back to Commissioner Myron M. Cohen for report.

On August 26, 1931, an agreed statement of facts was filed by the parties.

On March 7, 1932, the case was re-submitted on merits, without argument, by Mr. Cletus Keating, for plaintiff, and by Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 10] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed April 4, 1932

Mr. Cletus Keating for plaintiff. Mr. Staunton Williams was on the brief.

Mr. R. L. MacCutcheon, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant. Mr. J. Frank Staley was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

Plaintiff is a corporation doing business as average adjusters and insurance brokers.

On or about December 16, 1918, fire broke out on the U. S. Army Transport Logan bound from San Francisco to Manila with a general cargo aboard, belonging to various

owners. The Logan was under the operation, management, and control of the defendant. The fire was extinguished by the officers and crew and the vessel and some of the cargo thus saved from destruction. A portion of the cargo, however, was damaged by the water with which the fire was extinguished.

Some or all of the cargo aboard the U. S. Army Transport Logan at the time of the fire was covered by insurance against general average losses.

On August 22, 1922, Hugh Williams, captain, Q. M. C., and administrative officer, A. T. S., wrote plaintiff with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above, and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined."

On August 28, 1922, plaintiff answered this communication stating that "the preparation of the adjustment will receive our early attention."

Attached to defendant's letter to the plaintiff of August 22, 1922, was a letter from the Acting Judge Advocate General of the United States to the Quartermaster General of the United States dated July 21, 1922, and having reference [fol. 11] to the claim of the marine underwriters for contribution in general average, which letter stated, inter alia, as follows:

"3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this office to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.

* * * * * * *

"For the Acting Judge Advocate General.

"(S.) Sherman Moreland, Sherman Moreland, Colonel, Judge Advocate, Chief, Administrative Law Division."

Pursuant to the instructions received in the letter of August 22, 1922, plaintiff made a thorough investigation of the facts concerning the fire on the U. S. A. T. Logan, and prepared the usual general average statement dated December 31, 1926. On or about January 5, 1927, the plaintiff forwarded copies of this statement to the general superintendent, United States Army Transport Service, San Francisco, California.

At the time the general average statement was sent by the plaintiff to the general superintendent, U. S. Army Transport Service, at San Francisco, California, plaintiff also sent the defendant a bill which included the following items:

Plaintiff's charge for its services in the matter	$2,250.00
Pillsbury & Curtis, for valuing vessel	50.00
Telegrams	3.12
Dakin Publishing Co., for printing general average statement	62.00

The charge of $2,250 is the usual, customary, and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the plaintiff.

About May 22, 1928, the plaintiff was advised by the Comptroller General that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, and about May 28, 1928, the plaintiff wrote a letter to the Comptroller General setting forth more particularly the nature of its claim and referring to the letter signed by Hugh Williams, captain, Q. M. C., and administrative officer, A. T. S., requesting that a statement of general average be prepared. Subsequently the Comptroller General advised the plaintiff that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim.

The cargo of the said transport Logan consisted in part of supplies for the American expeditionary forces in Siberia, supplies for the American troops in the Philippine

[fol. 12] Islands, supplies belonging to the government of the Philippine Islands, and supplies belonging to the American Red Cross, together with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of said cargo was being transported or carried on said vesel free of charge.

No payment by way of contribution in general average has been made by the United States.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover $2,365.12 for services rendered and disbursements made in connection with a general average statement which plaintiff prepared at the request of the administrative officer of the United States Army Transport Service. The defense set up is that the evidence fails to show that the officer who directed the statement to be made had any authority to enter into a contract for that purpose.

It appears without dispute from the evidence that about August 22, 1922, the general superintendent and administrative officer of the United States Army Transport Service wrote to the plaintiff instructing it to prepare a statement of general average arising out of the damage done by fire to the cargo of the United States Army transport Logan, bound from San Francisco to Manila. The Logan was under the operation, management, and control of the defendant, and had a general cargo aboard belonging to various owners which was being transported free of charge. There is no evidence, however, that the Government had in

any way obligated itself to transport this cargo, or any part of it, or had made any contract of any kind with reference to it. Some or all of this cargo was covered by insurance against general average losses. The fire was extinguished by pouring water into the hold, and as a consequence a portion of the cargo was damaged by water or fire. Under this situation, Captain Hugh Williams, administrative officer of the Army Transport Service, wrote plaintiff enclosing a file of papers with reference to the loss of the cargo by the fire to which reference has been made, and requested that a statement of general average be prepared in order that the responsibility of the various parties concerned might be determined. The plaintiff responded in effect that the matter would be promptly attended to. It prepared a general average statement and rendered a bill for $2,250 for its services in the matter and $115.12 for disbursements connected therewith. The evidence shows that the charge made for preparing the statement was a reasonable one, and the disbursements necessary and proper in connection with its preparation.

[fol. 13] The plaintiff contends that the case is one to which it is proper to apply the maritime rule of general average, that it was the duty of the Government to have a general average statement prepared, and that the action of the officer of the Army Transport Service in requesting plaintiff to prepare such a statement made the Government liable for payment of plaintiff's services. These contentions are disputed by defendant and present the issues in the case.

It is not necessary for us to determine whether the case presents facts for the application of the rule of general average as between the owners of the cargo. The underlying question in the case is whether the Government can be made liable under the principles of general average, and it will be observed in this connection that the statement for a general average was requested on account of the claim of the underwriters for a contribution. The evidence does not show the precise nature of this claim, but the only purpose that the underwriters could have had in asking for the statement would be to make it the basis of a claim that the Government should contribute towards payment of the losses on the cargo. So also it is obvious that unless the defendant could be held liable for contribution on account

of the losses to the cargo, or might compel the cargo owners to contribute to the loss sustained by the vessel, the Government had no interest in having a general average statement made. The ultimate point to be determined is whether all of the losses caused by the fire would, under the circumstances of the case, be apportioned to both the ship and the cargo under the rule of general average. If the ship was not liable for contribution, the Government had no need for a statement of general average. In determining whether the principles of general average can be applied against the defendant in the case before us it becomes necessary that we should consider the origin and basis of the rule.

General average is defined to be a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them, for voluntary sacrifices of a part of the ship or cargo, to save the residue of the property or the lives of those on board from an impending peril. 36 Cyc. p. 372, A. The principle of contribution in general average is of very ancient origin, derived from the Rhodian law and applied by the inhabitants of the island of Rhodes who were noted in that day as mariners, centuries before the Christian era. The Romans adopted it and it eventually became a part of English law, and we in this country received it along with the common law of Great Britain. Some authorities assert that it depends on natural justice and equity arising out of the relation of the parties, while others hold that it arises out of a contract of affreightment and that the obligation to contribute is implied by law. Ordinarily when a ship carrying cargo, or on which it has been loaded, takes fire, and in extinguishing the fire the cargo is damaged to a greater or less extent, the rule of general average will apply, but the case at bar is a very exceptional one which, we think, takes it out of the general rule. So exceptional is the case that we can find no precedents to guide us, but must consider the foundation of the rule of general average and determine whether the reasons given for establishing it have any application to the instant case.

The case at bar differs from any other in which we are able to find that the rule of general average has been ap- [fol. 14] plied in that the cargo was being carried free. The defendant made no contract with reference to it, nor, as we think, can any be implied. The acts of the defendant

with reference to the cargo were merely permissive. The vessel was bound from San Francisco to Manila. The defendant permitted the cargo owners to place their cargo on board, but neither contracted to transport it nor to guard it. It was not in the situation of the owner of a vessel that takes any cargo offered for hire and therefore becomes subject to the rules pertaining to a common carrier, nor did it become a bailee for hire as when a vessel is chartered to carry a special cargo. It was very much in the position of the owner of a building who permitted another party to place goods therein, and in such case assumed no responsibility for theft or fire, or the consequences of a fire in the way of water damaging the goods.

When we consider this situation in connection with the theory and reasoning upon which the principles of general average are based, all reasons for applying it to the case against the defendant, as we think, disappear.

In the first place, general average is applied only in cases of joint adventure; that is, the parties must have a common purpose, in part at least. It is well known that among the ancients, and even down to a comparatively late date, it was quite common that arrangements should be made for a voyage in which captain, crew, and cargo owners shared in the profits which might be made, and this practice to some extent is still followed, more particularly in fishing fleets. But even where the cargo is carried for hire, both the owner of the vessel and the owner of the cargo have a common purpose and are engaged in the joint enterprise of having the cargo conveyed and landed at the point of destination, and, what is still more important, the owner of the vessel is paid therefor. This payment is not merely for the conveyance of the cargo, but for taking charge of it as well, and the owner of the vessel becomes responsible for its delivery at destination subject to certain exceptions not necessary to mention here. But in the instant case there was no common purpose, no joint enterprise or adventure in which defendant was concerned. Under the circumstances of the case at bar, we think no one would contend but that if the Government, after the cargo had been loaded and while the vessel still lay at the wharf, had concluded that it wanted to send the vessel in a different direction and to a different port, it would have the right to do so, and could have told

the owners of the cargo to unload it, and if they did not, could itself have taken the cargo out of the vessel and put it on the wharf. But if there had been a common adventure, it would have had no right to do this, for all of the parties thereto would be bound to perform their respective obligations incurred by reason of having entered upon it, and one of these obligations would of necessity have been the carrying of the cargo to the port of destination. This of itself, we think, shows conclusively that there was no common adventure.

In Ralli v. Troop, 157 U. S. 386, the principle that there must be a common adventure is emphasized over and over again, and it was said by the court:

"Three important decisions in the courts of the United States directly support the position that, in order to give a right to contribution in general average, the sacrifice must have been made for the safety of the common adventure, * * *."

[fol. 15] The right to general average where there is a common adventure is well supported by equitable principles. No good reason can be given why parties that engage in a joint enterprise should not share proportionately in losses which unavoidably result in attempting to carry out the joint adventure, and especially is it just that where the owner of the vessel is being paid to transport the cargo and is responsible for the care of the cargo, he should be subject to the rule of general average, if the cargo is injured in saving the ship. But in the case at bar the Government owed no duty to the owners of the cargo, except the duty not to injure it through negligence, of which there is no evidence and with which we would not be concerned in any event. What good reason can be given why the Government should be mulcted in damages (being guilty of no negligence) because it permitted the cargo owners to use part of the space on its vessel? We think it would be a new principle of law to permit a liability to rise solely and alone from a free or charitable act done in the first instance for the accommodation of the party seeking to recover damages. We conclude that the principle of general average does not apply to the Government in this case.

We do not overlook the decisions cited by plaintiff to sustain its position that the Government is liable herein. Our holding is not that the Government under no circumstances would be subject to the rules of general average, but that the case at bar is an exceptional one. The plaintiff cites a number of cases in support of its contention that the Government is liable for a general-average contribution to the same extent as a private individual. No doubt it is where it ships goods under a contract of affreightment, or charters a vessel to have its goods transported, and that is all that these cases hold. In such cases the Government is paying the vessel owner to carry the goods and take charge of them. It is engaged with the vessel owner and the owners of the remainder of the cargo in the common adventure and joint enterprise of having the cargo transported by the ship to its destination. But in the case at bar these essential elements do not appear, and the cases cited are not an authority for the position taken by plaintiff.

If we are correct in what is stated above, it follows that the Government had no interest in the statement of general average, because it would not in any event be liable to contribute for the loss on the cargo. Consequently no one could have any authority to contract for a statement of general average.

While counsel for defendant deny that the facts before the court present a case to which the rules of general average would apply as against the Government, they rest their case largely on the contention that Captain Williams, who was the administrative officer of the Army Transport Service, had in any event no authority to order a statement of general average to be made, and the question thus arising must also be considered.

The authority of Government officials to make a contract on behalf of the Government is never presumed but must be shown to exist through some constitutional or statutory provision, although it may be implied therefrom or from the nature of the duties of a Government official occupying an office lawfully created. It may be conceded for the purposes of the case that as administrative officer of the Army Transport Service, Captain Williams had the authority to do [fol. 16] whatever was needful for the transportation of the defendant's troops, together with their equipment and sup-

plies so far as they belonged to the Government. The nature of his duties as such officer would imply such authority. But it is quite clear that he had no authority to contract for the transportation of cargo owned by other parties; and equally clear, as we think, that he had no authority to make the Government liable for contribution in case of injury to a cargo permitted to be on the Government transport, when the injury was caused by efforts made to preserve the vessel and cargo; and there is no evidence that he intended to do so when the cargo was placed on board the Government vessel. There is no evidence as to who, if anyone, gave permission for the cargo to be on the vessel, although it should be said in this connection that we do not think this would be material if it had been shown. Indeed, there is no evidence in the case as to just how the cargo came to be upon the Government vessel.

The only matter to which plaintiff calls our attention as showing that Captain Williams had authority to contract for such services is the fact that the Acting Judge Advocate General and Chief of the Administrative Law Division wrote a letter to the Quartermaster General of the United States, dated July 21, 1922, with reference to the claim of the marine underwriters for a contribution in general average, which letter stated, among other things, that—

"The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster."

The letter further stated in substance that such procedure was necessary in order to ascertain the amount due the insurance company.

It may be inferred from the opinion of the Judge Advocate General that the defendant might be liable for contribution to the insurance companies on account of losses to the cargo. While the Judge Advocate General was acting within the scope of his duties in rendering the opinion, he could not authorize a contract with reference to a general average statement, or, in other words, could not create authority where it did not exist. Moreover, the opinion does not hold that Captain Williams had authority to make

the contract in question, and if it did, the utmost that we can say with reference to it is that it is entitled to respectful consideration.

As we have in effect held that the administrative officer of the Army Transport Service had no authority to bind the Government to make a contribution either to the owners of the cargo or to the insurance companies, and that there was no implied obligation, it may appear to be superfluous to add that even if it was the duty of the Government, as owner of the vessel, to furnish a statement of general average our attention has not been called to any statutory provision, or any implication therefrom, which would authorize any person to bind the Government to pay for a statement of general average. It may possibly be asked, If Captain Williams did not have this authority, who did? But it is not necessary for us to determine whether anyone had such authority, for it does not follow that even if a duty was cast upon the Government to furnish a general average statement, any official had been given authority to [fol. 17] order one made. It is only necessary that we should determine whether Captain Williams had such authority, and we find nothing in the nature of his position from which it might be implied even if the duty was cast upon the defendant to have one made. In this connection it should be noted that the preparation of the statement for general average was not for the benefit of the Government, but for the benefit of those who had insured the cargo. No claim is made that if the statement had not been ordered a liability would have been created against the Government. The only case cited in this connection, where those who prepared a general average statement were held entitled to recover the cost of preparing such statement, is that of Coast Wrecking Co. v. Phoenix Insurance Co., 13 Fed. 127. This is a case in which a bond had been given for the expenses connected with the establishment of liabilities under the rule of general average, and a libel had been filed upon the vessel. The questions involved in the case were altogether different from those in the case at bar and it furnishes no authority in support of plaintiff's position.

It follows from what has been stated that plaintiff's petition must be dismissed and it is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 18] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of April, A. D., 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that the petition be dismissed.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 36,863. Court of Claims. Term No. 166. Johnson & Higgins of California, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 21, 1932. File No. 36,863.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.